80-908
No.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES,
A Municipal Corporation, et. al.

Petitioner,

v.

VILLAGE OF BARRINGTON HILLS,
A Municipal Corporation, et. al.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

1. Whether a State Court's finding that granted standing of non-contiguous municipalities to challenge zoning decisions of the Petitioner is violative of Article III, Section 2 of the United States Constitution as it relates to said municipalities claim of denial of due process of law under the Fourteenth Amendment of the United States Constitution.

2. Whether a State Court's finding that non-contiguous municipalities can allege due process rights in their corporate municipality function to challenge a zoning decision of another municipality under the Fourteenth Amendment of the United States Constitution is violative of the Constitution of the United States.

NOTE: Parties to the proceeding in the Supreme Court of Illinois:

VILLAGE OF BARRINGTON HILLS, a municipal corporation, and VILLAGE OF SOUTH BARRINGTON, a municipal corporation,

Plaintiffs-Appellants,

v.

VILLAGE OF HOFFMAN ESTATES, a municipal corporation, NEDERLANDER REALTY COMPANY OF ILLINOIS, a corporation, PERFORMANCE PROPERTIES, INC., a Delaware corporation, NED-PROP, an Illinois Joint Venture, RKO GENERAL, INC., a New York corporation, PIONEER BANK AND TRUST CO., as Trustee under Trust No. 13552, dated April 24, 1962, FRED HANSEN and ETHEL HANSEN,

Defendants-Appellees.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

The Petitioner, Village of Hoffman Estates, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court entered September 26, 1980, denying petition for rehearing of the Illinois Supreme Court's opinion of May 12, 1980.

OPINIONS BELOW

On October 23, 1978, a final order upon a Motion to Dismiss was entered in the Cook County Circuit Court that the Villages of Barrington Hills and South Barrington did not have standing to bring the litigation against Petitioner (Appendix A). An appeal was taken by Respondents to the Appellate Court of Illinois, First District.

On August 21, 1979, the Appellate Court of Illinois affirmed the order of the Circuit Court (Appendix B). The opinion was certified for publication by the Court and was reported at 394 N. E. 2d 599. An appeal was taken by Respondents to the Supreme Court of Illinois.

On May 12, 1980, the Supreme Court of Illinois reversed the judgment of the Appellate Court (Appendix C). The opinion was certified for publication by the Court and was reported at 410 N. E. 2d 37. A petition for rehearing was filed in the Supreme Court of Illinois.

On September 26, 1980, the Supreme Court of Illinois denied the petition for rehearing (Appendix D).

JURISDICTION

This Petition of Certiorari has been filed within 90 days of the denial of the petition for rehearing by the Illinois Supreme Court filed September 26, 1980 and is timely docketed in this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of Article Three and the Fourteenth Amendment of the Constitution of the United States are set forth in Appendix E.

STATEMENT OF THE CASE

Petitioner, Village of Hoffman Estates, is a home rule municipality. Original Defendants, Nederlander Realty Company of Illinois, Performance Properties, Inc., Ned-Prop and RKO General, Inc. (hereinafter "the Nederlander Group"),

are related corporate entities and joint ventures who, at the time of Respondents suit, intended to construct an outdoor music theatre on the property that is the subject of this litigation.

Respondents are both municipal corporations. The Village of Barrington Hills is not a home rule municipality. The Village of South Barrington is a home rule municipality.

The Nederlander Group planned to construct an outdoor, open-air music theatre, to be known as the Poplar Creek Music Theatre on 212 acres of land within the Village of Hoffman Estates and in close proximity to but not contiguous to Barrington Hills and South Barrington. The theatre was alleged to seat approximately 20,000 people: 6,000 in an auditorium structure and 14,000 in the open. Parking spaces were to be provided for 6,000 to 7,500 automobiles. Concessions and other commercial activities will be conducted ancillary to the concerts and music programs and other performances that were to be offered by the theatre. The Nederlander Group intended to present performances at the theatre a minimum of one hundred days during the summer season of each year. All music performances were to be electronically amplified.

On August 22, 1978, following 21 public hearings, Hoffman Estates passed and approved three ordinances authorizing the Nederlander Group to use the subject property for an outdoor music theatre. Ordinances No. 1039-1978 and 1041 authorized an annexation agreement relating to the subject property. Ordinance No. 1040-1978 annexed the property to Hoffman Estates. Ordinance No. 1041 rezoned part of the subject property in the B-2 Business District in order to permit the construction and operation of the theatre. The balance was classified in the "F" Farming District. Prior to August 22, 1978, the theatre site had been classified in the R-1 Single Family Residence District under the Cook County Zoning Ordinance.

Land use in the immediate vicinity of the subject property is characterized as forest preserve and single family residences on two-or-more acre lots, farm residences, farming activities, open space and woodlands.

The Respondents' six-count complaint alleged that the construction and operation of the theatre would be inconsistent with the character of the area and the trend of its development and would inflict specific and distinct injury upon Barrington Hills and South Barrington in violation of due process of law under the federal and state constitutions.

Both Barrington Hills and South Barrington alleged that the theatre would cause forms of special damage to them, including expenses for additional police, expenses to clear litter, additional police equipment, decrease in real property taxes due to decrease in property values, public safety hazards within each Village due to traffic congestion, impaired public security and protection due to the diversion of police officers from their ordinary duties in order to monitor theatre crowds and traffic, degradation of ambient air quality due to vehicular traffic exhaust emissions, substantial increases in sound levels, and hazards to the health, safety and welfare of the residents of both Barrington Hills and South Barrington, before, during and after performances. Both Villages alleged that their ability to provide essential public services would be impaired by operation of the outdoor music theatre.

Petitioner contended in its motion to dismiss that the Respondents' allegation of special injuries did not state a cause of action on any constitutional ground so as to confer standing on them to maintain this action. The ruling of the Circuit Court and Appellate Court sustained that motion. The Illinois Supreme Court reversed holding that the effects of rezoning by the Village of Hoffman Estates "portend" adverse effect upon Respondent municipalities thereby giving them a real interest in the subject matter of the controversy.

HOW THE FEDERAL QUESTION IS PRESENTED

Petitioner joined with Nederlander in its Motion to Dismiss filed October 10, 1978 in the Circuit Court of Cook County, Illinois (Appendix F) and at Paragraph 6 raised the

issue of Respondents' lack of standing on Constitutional grounds as alleged by Respondents under a due process of law claim as no taking of property was alleged or occurred. Further, said motion argued Respondents failed to state a cause of action for relief (Paragraph 3) and that any injuries alleged were general and, therefore, Respondents were not "aggrieved" parties for purposes of standing (Paragraph 11).

It is upon this Motion to Dismiss that the Circuit Court filed its Order of Dismissal which was affirmed by the Appellate Court and reversed by the Illinois Supreme Court finding that Respondents original complaint did demonstrate a "real interest" in the controversy and Respondents were "aggrieved parties" with standing to go forward on their claim that they were denied due process of law under the Federal Constitution.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. THERE IS NO BASIS FOR GRANTING STANDING OF NON-CONTIGUOUS MUNICIPALITIES TO CHALLENGE THE ZONING DECISION OF ANOTHER MUNICIPALITY.

In *Orr* v. *Orr,* 440 U.S. 268 (1979), this Court permitted issues of standing under Article III, Section 2 of the Constitution of the United States to be reviewed by the Court although the appeal was from a federal question considered by a State Court. A claim in Petitioner's case herein was that the adoption of a zoning ordinance by the Village of Hoffman Estates was a denial of due process of law under the Federal and State Constitution to the non-contiguous municipalities of Barrington Hills and South Barrington. The Illinois Supreme Court granted standing to the non-contiguous municipalities stating that the effects of rezoning "portend direct, substantial and adverse effects upon the plaintiff municipalities".

The test of standing as determined in *Warth* v. *Seldin,* 422 U.S. 490 (1975) is "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' to warrant *his* invocation of Federal-Court jurisdiction" 422 U.S. 498-499, quoting *Baker* v. *Carr,* 369 U.S. 186 (1962).

By any definition of a municipal corporation the grievance is generalized. As stated in *Warth* v. *Seldin,* "the Court has held that when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction" 422 U.S. at 499.

Quoting portions of *Warth* v. *Seldin* in *Gladstone Realtors* v. *Bellwood,* 441 U.S. 91 (1979), this Court found that a crucial element of standing to be an injury in fact. It was stated that to "demonstrate the 'personal stake' in the litigation necessary to satisfy the Constitution, the party must suffer 'a distinct and palpable injury' that bears a 'fairly traceable' causal connection to the challenged action". 441 U.S. at 120.

The action of the Illinois Supreme Court to reverse the Appellate Court and Circuit Court decisions denying standing did accept as true all material allegations of the complaint. The allegations were all prospective in nature as the suit was brought to enjoin construction of an outdoor concert theatre seating 20,000 persons and no damages presently ascertainable were alleged. While threatened injury can create standing; where the threatened injury is to the municipalities in general, the "generalized grievance" argument becomes further generalized.

2. WHETHER A STATE COURT'S FINDING THAT NON-CONTIGUOUS MUNICIPALITIES CAN ALLEGE DUE PROCESS RIGHTS IN THEIR CORPORATE MUNICIPALITY FUNCTION TO CHALLENGE A ZONING DECISION OF ANOTHER MUNICIPALITY UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION IS VIOLATIVE OF THE CONSTITUTION OF THE UNITED STATES.

It has often been held that municipalities are not "persons" for standing to challenge state statutes within the meaning of the Fourteenth Amendment. In *City of New York* v. *Richardson,* 473 F. 2d 923, (C.A.N.Y.—1973) cert. den. 412 U.S. 950, the Court said, "Political subdivisions of a state may not challenge the validity of a statute under the Fourteenth Amendment" 473 F. 2d at 929, and they cited as authority the opinion of this Court in *Williams* v. *Mayor and City Council of Baltimore,* 289 U.S. 36 (1933) holding that a municipal corporation has no privileges or immunities under the Federal Constitution that it may invoke against its creator.

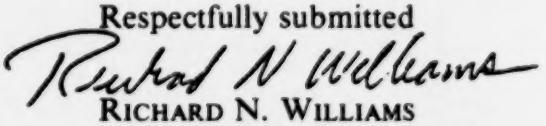
The issue is novel as to municipalities making claims against other municipalities under alleged Fourteenth Amendment due process claims. While the cases of *Monell* v. *New York City Dep't. of Social Services,* 436, U.S. 658 (1978) and *Owen* v. *City of Independence,* ____ U.S. ____ (1980) have extended the definition of "persons" in 42 U.S.C. 1983 actions to municipalities in limited fact situations, no such interpretation has been made by this Court that municipalities are "persons" for purposes of claiming the protections of Section 1 of the Fourteenth Amendment.

Said Section 1 first protects "citizens" and then protects "persons". This Court has extended the interpretations of "persons" to include artificial persons such as a corporation in claims of denial of property rights, *Smyth* v. *Ames,* 18 S. Ct. 418 (1898). However, diligent research has found no such case granting standing to a municipal corporation to claim property right deprivation under the due process clause of the Fourteenth Amendment and the matter should be addressed by this Court before any such extension is presumed by the State and Federal Courts.

CONCLUSION

For these reasons, a writ on certiorari should issue to review the judgment and opinion of the Supreme Court of Illinois.

Respectfully submitted



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Appendix

EXHIBIT "A"

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT CHANCERY
(COUNTY) (MUNICIPAL) (DIVISION) (DISTRICT)

VILLAGE OF BARRINGTON HILLS, a municipal corporation, and VILLAGE OF SOUTH BARRINGTON, a municipal corporation,

Plaintiffs,

v.

VILLAGE OF HOFFMAN ESTATES, a municipal corporation, et al.,

Defendant.

No. 78 CH 5930

ORDER

THIS MATTER having come on to be heard upon the Motions of Defendants to dismiss the Complaint for Injunction and Other Relief, due notice having been given, the Court having reviewed all memoranda submitted and having heard oral argument in open court by the parties and the Court being otherwise fully advised in the premises and, having reached its conclusion of law herein on the issue of the standing of the Plaintiffs to maintain this action, the Court has not considered or ruled upon the other grounds relied upon by the Defendants for dismissal of the Complaint or upon the matters raised in the affidavits filed in support of Defendants' Motions to dismiss, and does not find it necessary to rule upon the Plaintiffs' Motion to Strike Portions of Defendants' Motion to Dismiss and the said affidavits;

IT IS HEREBY ORDERED that this Court finds that based upon the allegations of the Complaint for Injunction and Other Relief that the Plaintiffs, the Village of Barrington Hills

and South Barrington, do not have standing to bring this litigation against said Defendants and therefore the Motions to Dismiss based upon the issue of standing be and the same are hereby granted;

IT IS FURTHER ORDERED that Plaintiffs take nothing from these Defendants and go hence without delay. There is no just reason to delay enforcement of or appeal from this Order.

Name: WEXLER AND SHAW, LTD.

Attorney for: Certain Defendants

Address: 180 N. LaSalle

City: Chicago, IL 60601

Telephone: 726-1272

October 23, 1978

ENTER:

_____

Judge

MORGAN M. FINLEY,
CLERK OF THE CIRCUIT COURT OF COOK COUNTY

EXHIBIT "B"

VILLAGE OF BARRINGTON HILLS, a municipal corporation, and VILLAGE OF SOUTH BARRINGTON, a municipal corporation,

Plaintiffs-Appellants,

v.

VILLAGE OF HOFFMAN ESTATES, a municipal corporation, NEDERLANDER REALTY COMPANY OF ILLINOIS, a corporation, PERFORMANCE PROPERTIES, INC., a Delaware corporation, NED-PROP, an Illinois Joint Venture, RKO GENERAL, INC., a New York corporation, PIONEER BANK AND TRUST CO., as Trustee under Trust No. 13552, dated April 24, 1962, FRED HANSEN, and ETHEL HANSEN,

Defendants-Appellees.

Appeal From The Circuit Court of Cook County

No. 78-1944

Honorable **Raymond K. Berg,** Judge Presiding.

Mr. JUSTICE DOWING delivered the opinion of the court:

Does one municipality have standing to challenge the zoning decision of another municipality? That is the sole issue in this appeal. Plaintiffs, the Village of Barrington Hills (Barrington Hills) and the Village of South Barrington (South Barrington), appeal an order of the circuit court of Cook County dismissing their complaint against defendants, the Village of Hoffman Estates (Hoffman Estates); Nederlander Realty Company of Illinois, Performance Properties, Inc., Ned-Prop, RKO General, Inc. (the Nederlander Group); Pioneer Bank and Trust Company; and Fred and Ethel Hansen. The facts alleged in the plaintiff's complaint follow.

The Nederlander Group, related corporate entities and joint venturers, plans to construct an outdoor, open-air music theater on 212 acres of land located in Barrington Township in close proximity[1] to Barrington Hills, a non-home rule municipality and South Barrington, a home rule municipality. Pioneer Bank and Trust Company holds legal title to the property in trust for Fred and Ethel Hansen, the beneficial owners of the property. The theater will seat approximately 20,000 people: 6,000 in an auditorium and 14,000 in the surrounding area. Parking spaces will be provided for 6,000 to 7,500 cars, and concessions and other commercial activities will be conducted ancillary to the theater's performances and electronically amplified music programs.

On August 22, 1978, Hoffman Estates passed three ordinances pertaining to the subject property: Ordinance No. 1039-1978 authorized an annexation agreement; Ordinance No. 1040-1978 annexed the subject property to Hoffman Estates; and Ordinance No. 1041-1978 rezoned part of the subject property to B-2 Business District and part to "F" Farming District to permit the construction and operation of the theater. Prior to the adoption of these ordinances, the subject property had been located in an unincorporated area of Cook County and classified in the R-1 Single Family Residence District under the Cook County zoning ordinance. Both Barrington Hills and South Barrington by ordinance adopted a comprehensive plan restricting the use of land in the vicinity of the subject property to single family residences at low densities and to rural uses.

The plaintiffs' six-count complaint further alleges that the defendants' adoption of the zoning ordinances and the construction and operation of the theater illegally and uncon-

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[1] The subject property is located in parts of the west 1/2 of section 33 and the east 1/2 of section 32 of Barrington Township. It is bound by the Northwest Tollway on the south, the Elgin, Joliet & Eastern Railway on the west, Higgins Road on the north, and New Sutton Road on the east. Neither plaintiff village adjoins or is contiguous to the subject property. A point of the Village of Barrington Hills is north of and across Higgins Road. The Village of South Barrington is approximately 1/4 mile from the subject property.

stitutionally create a public nuisance not permitted by Hoffman Estates' B-2 Business District zoning. In general plaintiffs assert that the construction and operation of the theater will be inconsistent with the character and trend of development of the area, and will inflict specific and distinct injury upon them. The alleged prospective special damages which allegedly will impair the health, safety, and general welfare of the plaintiffs' residents include: (1) safety hazards due to traffic congestion, (2) the need for additional traffic police at an annual cost to Barrington Hills of at least $42,000 and to South Barrington of $24,000; (3) the cost of clearing litter and debris deposited by crowds en route to and from the theater on the plaintiffs' roads, (4) the cost of additional police squad cars and the diversion of its existing police force to monitor theater crowds and traffic, (5) the degradation of ambient air quality due to vehicular traffic exhaust emissions, (6) substantial increases in sound levels during performances and traffic flows, and (7) decreased municipal revenues from *ad valorem* real property taxes as a result of diminished property values in the vicinity of the theater.

The defendants' motion to dismiss the plaintiffs' complaint asserts, *inter alia* that neither of the plaintiffs is contiguous to or provides services to the subject property, and that none of the facts alleged show special damages establishing that the plaintiffs are aggrieved parties having standing to litigate Hoffman Estates' zoning of the subject property. The trial court granted the defendants' motion, and the plaintiffs appeal.

I.

The threshold question is when does a municipality become an aggrieved person with standing to challenge a zoning decision of another municipality. In a number of cases this court has held that in the absence of express or implied statutory authority, a municipal corporation lacked standing to challenge the zoning of land located outside its borders in

unincorporated areas of Cook County. See *Village of Bensenville* v. *County of Du Page* (2nd Dist. 1961), 30 Ill. App. 2d 324, 174 N. E. 2d 403 (Abst.); *Village of Mount Prospect* v. *County of Cook* (1st Dist. 1969), 113 Ill. App. 2d 336, 252 N. E. 2d 106; *Krembs* v. *County of Cook* 1st Dist. 1970), 121 Ill. App. 2d 148, 257 N. E. 2d 120; *Vil. of Arlington Heights* v. *County of Cook* (1st Dist. 1971), 133 Ill. App. 2d 673, 273 N. E. 2d 706; *Vil. of Arlington Heights* v. *Cook County* (1st Dist. 1971), 3 Ill. App. 3d 213, 278 N. E. 2d 841.

However, in *Forestview Homeowners Ass'n* v. *Co. of Cook* (1st Dist. 1974), 18 Ill. App. 3d 230, 309 N. E. 2d 763, petition for leave to appeal denied, 56 Ill. 2d 582, we upheld the Village of Northbrook's permissive intervention in a suit challenging the county's rezoning of property located approximately one and one-half miles from Northbrook's corporate limits. We held that article VII, section 6(a) of the Illinois Constitution of 1970 (Ill. Const. 1970, art. VII, §6(a)) by which the Village of Northbrook became a home rule unit provided the constitutional authority to exercise any power and perform any function pertaining to its government and affairs. We held that when a municipality engages in litigation to enforce the public policy manifested by its ordinances, it is engaged in a governmental function.

The specific issue of a municipal corporation's standing to institute an action to challenge a zoning decision of an adjoining municipality was considered by our supreme court in *Hickory Hills* v. *Bridgeview* (1977), 67 Ill. 2d 399, 367 N. E. 2d 1305. Following reference to the foregoing cases, the court stated:

> "From an examination of the authorities (see Annot., 49 A.L.R. 3d 1126 (1973), and cases there collected) it would appear that the general rule that 'an aggrieved person' with a real interest in the subject matter of the controversy may challenge a zoning ordinance is applicable to municipal corporations." (*Hickory Hills, supra* at 403.)

The supreme court then held that as Hickory Hills was required to supply sewer and water facilities to the area involved, it was an aggrieved person with a real interest in the controversy. Thus, despite the absence of statutory authority, a municipal corporation may challenge the zoning decision of another municipal corporation, if such a municipality is found to be "an aggrieved person" with a real interest in the subject matter. *Hickory Hills, supra;* see also *City of West Chicago* v. *County of Du Page* (2nd Dist. 1979), 67 Ill. App. 3d 924, 926, 385 N. E. 2d 826.

As between property owners and municipalities or counties, it is well recognized that in order to establish standing to challenge a zoning decision determining the use to which another's property may be put, an individual property owner must prove that he has suffered a special damage by reason of such use which differs from that suffered by the general public. (*Treadway* v. *City of Rockford* (1963), 28 Ill. 2d 370, 376, 192 N. E. 2d 351; *Garner* v. *County of Du Page* (1956), 8 Ill. 2d 155, 158-59, 133 N. E. 2d 303; *Whittingham* v. *Village of Woodridge* (2nd Dist. 1969), 111 Ill. App. 2d 147, 150, 249 N. E. 2d 332.) Considering the meaning of the requirement that to have standing a plaintiff must be a person "interested in the controversy," the supreme court in *Underground Contractors* v. *Chicago* (1977), 66 Ill. 2d 371, 362 N. E. 2d 298 observed:

> "The word, 'interested' does not mean merely having a curiosity about or a concern for the outcome of the controversy. Rather, the party seeking relief must possess a personal claim, status, or right which is capable of being affected. [Citation omitted.] The dispute must, therefore, touch the legal relations of parties who stand in a position adverse to one another." (*Underground Contractors, supra* at 376.)

In *Forestview, supra,* and in *City of West Chicago, supra,* the plaintiffs' suits challenged zoning decisions made by county zoning boards affecting properties located in unincorporated

areas of those counties but within one and one-half miles of the municipalities' boundaries. In *Forestview,* we gleaned from the language of article VII, section 6(c) of the Illinois Constitution (Ill. Const. 1970, art. VII, § 6(c)) an intent to grant priority to municipalities over counties in matters of local concern (see *Forestview, supra* at 238, fn. 3). We are of the opinion that such a priority and concern for municipality-county relations may also be ascertained from several statutes. For example, section 1 of the County Zoning Act (Ill. Rev. Stat. 1977, ch. 34, par. 3151) provides in part that:

> "Nothing in this Act shall be construed to restrict the powers granted by statute to cities, villages and incorporated towns as to territory contiguous to but outside of the limits of such cities, villages and incorporated towns. Any zoning ordinance enacted by a city, village or incorporated town shall supersede, with respect to territory within the corporate limits of the municipality, any county zoning plan otherwise applicable." (Ill. Rev. Stat. 1977, ch. 34, par. 3151.)

Moreover, section 2 of that Act requires a three-fourths vote rather than a simple majority vote of a county board zoning land lying within one and one-half miles of the nearest adjacent municipality if that municipality has a zoning ordinance and has protested the proposed zoning. Ill. Rev. Stat. 1977, ch. 34, par. 3152.

Relying on section 2, the plaintiff in *City of West Chicago, supra,* sought to declare the invalidity of the county's ordinance passed by a simple majority vote which granted a special use permit to locate offices, a garage, and other facilities on property zoned under the county's R-2 zoning ordinance and located within one and one-half miles of the city. Although finding section 2 inapplicable, the court concluded that the city had standing to challenge the decision based on its allegations that the property had been classified in the city's master plan. The court concluded therefore that the city was an aggrieved

party with a stake in the outcome of the controversy. Relying on *Hickory Hills,* the court found that West Chicago had the capacity to litigate the validity of county zoning ordinances even absent an explicit statutory authorization to do so.

We note that section 11-12-11 of the Municipal Code provides that if a municipality has adopted an official plan or map, the territory subject to that plan is exempt from the application of any less restrictive rules or regulations adopted by a county zoning ordinance. (Ill. Rev. Stat. 1977, ch. 24, par. 11-12-11.) We are of the opinion that section 11-12-11's recognition of the priority of municipalities over counties in such circumstances supports the court's finding that the City of West Chicago had standing to litigate the county's zoning decision. See also *Ruegg* v. *Board of Cty. Com'rs, Clackamus Cty.* (1978), 32 Or. App. 77, 573 P. 2d 740, 742.

The rationale for the priority of municipalities over counties in matters of local concern becomes apparent, when, as in *forestview,* it is also recognized that many of the unincorporated areas of a county become annexed to existing municipalities. In that case, the possibility that Northbrook would annex the subject property and therefore would be required to provide it with highways, public water supplies, storm sewers, sanitary sewers and drainage created the duty to concern itself with the development of the practically adjoining property, and conferred standing on the Village of Northbrook to intervene. See *Forestview, supra* at 238, fn. 4.

In the instant case the Village of Hoffman Estates has annexed the subject property and therefore has the statutory right to exercise all zoning and regulatory powers over it. (See Ill. Rev. Stat. 1977, ch. 24, par. 11-13-1.) The plaintiffs do not challenge the annexation. Other than the aforementioned statutory authority which grants to an annexing municipality the right to exercise all zoning and regulatory powers over the annexed area even though it had previously been zoned by another municipality, we have found neither constitutional nor statutory authority from which we may glean an intent to establish any priorities between contiguous municipalities.

In the development of suburban areas, with municipalities adjoining and contiguous one to another, the boundary lines must start and stop at some point. The rights and powers of each municipality must be paramount and superior to adjoining municipalities. Otherwise the mischievous activities of one municipality could hold in hostage the governmental functions of another municipality. To this general rule is the delimited exception set forth in *Hickory Hills* for those circumstances in which an aggrieved municipality is also able to establish that it has a real interest in the subject matter of the litigation.[2] Even taking as true the well pleaded allegations of the plaintiffs' complaint, as we must for purposes of the defendants' motion to dismiss (see *Brown* v. *County of Lake* (2nd Dist. 1966), 67 Ill. App. 2d 144, 152, 213 N. E. 2d 790), we do not find the plaintiffs' allegations sufficient to fall within this exception.

In *Hickory Hills,* the plaintiff and defendant muncipalities had been involved in prior litigation which resulted in a court order requiring the plaintiff to supply sewer and water facilities to an area located within the Village of Bridgeview. Thereafter Bridgeview passed two rezoning ordinances, one of which approved use of a portion of the involved area as a planned unit development. The plaintiff municipality, as well as a number of individual plaintiffs, sought to declare the invalidity of the ordinance and to permanently enjoin the proposed planned use development. They alleged, *inter alia,* that the water supply, sewer, and street systems of the plaintiff were inadequate to serve the proposed development, and that it "would create a serious hazard to all of the plaintiffs herein and their property and would destroy the economic value and be detrimental to and would endanger the public health, safety, morals, comfort and general welfare of the area." (*Hickory Hills, supra* at 401.) The trial court dismissed the complaint on

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[2] Although we note that a number of individual plaintiffs joined in the suit in *Hickory Hills,* no individual property owners are joined in the present suit. Thus, our remarks do not apply to the rights of individual property owners who allege special damages by virtue of the action of an adjoining municipality.

the ground that the earlier judgment barred the plaintiffs' action and the appellate court affirmed. On appeal to the supreme court, the plaintiff municipality contended that the question of its legal right, "as an aggrieved party, showing a demonstratively unique impact and effect on its proprietary functions, to challenge the zoning of a contiguous municipality" had not been adjudicated in the prior litigation. (*Hickory Hills, supra* at 402.) The supreme court agreed finding that, while the earlier case had decided which of the two municipalities had jurisdiction over the area and that the plaintiff had a duty to provide the services, "the question here involved is the validity of the ordinance and its effect upon the plaintiff's continued obligation to make sewer and water services available." (*Hickory Hills, supra.*) Considering the question of plaintiff's standing for the first time, the supreme court held that a municipal corporation may be an aggrieved person, and then concluded that:

> "[I]n view of the prior litigation, and the order which requires plaintiff to supply sewer and water facilities to the area involved, *plaintiff is an aggrieved person with a real interest* in the subject matter of this controversy." (*Hickory Hills, supra,* at 403.) (Emphasis added.)

In the instant case, we can understand that the plaintiffs may in some way be unhappy by the rezoning and development of the subject property. However, on the basis of *Hickory Hills,* we are of the opinion that it was incumbent upon the plaintiffs to also allege facts, such as those in *Hickory Hills,* establishing that they had a real interest in the controversy. Although, as here, the plaintiffs in *Hickory Hills* alleged that the proposed development would adversely affect their street systems, and the economic value of their property, the supreme court did not consider these allegations, but as we read the case, focused solely upon the question of the ordinance's impact on Hickory Hills' continued obligation and ability to provide sewer and water services. Unlike the effect on its street systems and property values which would likewise be felt by other neighboring municipalities, Hickory Hills' responsibility of providing

water and sewer services to the area placed Hickory Hills in a position in which the ordinance approving the proposed planned unit development would have a "demonstratively unique impact and effect on its proprietary functions" unlike that of other municipalities, and thus gave it a real interest in the subject matter of the controversy.

The plaintiffs' complaint in the instant case does not allege, and, as is apparent from the defendants' agreement entered into as part of the annexation to provide all services to the subject property, cannot allege that they have been or will in the future be required to supply water or sewer facilities, or for that matter any services directly to the subject property. Under these circumstances, we are of the opinion that the trial court properly found that the plaintiffs lacked standing to litigate the validity of the ordinance. Accordingly, the trial court's order dismissing the plaintiffs' complaint must be affirmed.

Affirmed.

STAMOS, P.J., and PERLIN, J., concur.

EXHIBIT "C"

OPINION

Supreme Court

of Illinois

United States of America

STATE OF ILLINOIS
SUPREME COURT } ss.:

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the twelfth day of May in the year of our Lord, one thousand nine hundred and eighty, within and for the State of Illinois.

PRESENT: JOSEPH H. GOLDENHERSH, CHIEF JUSTICE

JUSTICE C. UNDERWOOD
JUSTICE HOWARD C. RYAN
JUSTICE THOMAS J. MORAN
JUSTICE DANIEL P. WARD
JUSTICE WILLIAM G. CLARK
JUSTICE THOMAS E. KLUCZYNSKI
WILLIAM J. SCOTT, ATTORNEY GENERAL
LOUIE F. DEAN, MARSHAL
ATTEST: CLELL L. WOODS, CLERK

BE IT REMEMBERED, that afterwards, to-wit, on the 20th day of June, 1980 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

Village of Barrington Hills, a municipal corporation, et al., etc.,
Appellants

vs.

Village of Hoffman Estates, a municipal corporation, et al., etc., et al.,
Appellees

Appeal from Appellate Court First District

No. 52587

Docket No. 52587—Agenda 35—March 1980.

THE VILLAGE OF BARRINGTON HILLS et al., Appellants, v. *THE VILLAGE OF HOFFMAN ESTATES et al., Appellees.*

MR. JUSTICE UNDERWOOD delivered the opinion of the court:

Plaintiffs, the village of Barrington Hills (Barrington Hills) and the village of South Barrington (South Barrington), filed a complaint challenging the adoption of particular zoning ordinances and the construction of an open-air theater against defendants, the village of Hoffman Estates (Hoffman Estates); Nederlander Realty Company of Illinois, Performance Properties, Inc., Ned Prop, RKO General, Inc. (Nederlander Group); Pioneer Bank and Trust Company; and Fred and Ethel Hansen. The circuit court of Cook County dismissed their complaint on the ground that plaintiffs lacked standing to maintain their action, and the appellate court affirmed. (75 Ill. App. 3d 461.) We granted leave to appeal.

The facts alleged in the plaintiffs' complaint are adequately set forth in the opinion of the appellate court and need only be summarized here. The subject property consists of approximately 212 acres located in Barrington Township, Cook County, and is included in a larger tract of land bounded by the Northwest Tollway on the south, the Elgin, Joliet and Eastern Railway on the west, Higgins Road on the north, and New Sutton Road on the east. The corporate limits of Barrington Hills, a non-home rule municipality and South Barrington, a home rule municipality "are adjacent or in close proximity to the property"; and legal title thereto is held in trust by the Pioneer Bank and Trust Company for Fred and Ethel Hansen, the beneficial owners of the property.

It is alleged in the complaint and admitted by the motion to dismiss (*Goodman* v. *Regional Transportation Authority* (1976), 66 Ill. 2d 20) that the Nederlander Group plans to

develop this real estate for an open-air music theater, to be known as the Poplar Creek Music Theater, which would contain approximately 6,000 seats in an auditorium structure and space in the open for an additional 14,000 persons. The project would also require parking spaces for 6,000 to 7,500 automobiles and would involve commercial and concession activities ancillary to the operation of the theater programs. Among the performances contemplated by the developers are rock concerts, jazz festivals, and country-and-western musical programs, all of which would be electronically amplified.

Following a public hearing pertaining to the annexation of the subject property, Hoffman Estates on August 22, 1979, adopted three ordinances: Ordinance No. 1039-1978 authorized the execution of an annexation agreement between the defendants; Ordinance 1040-1978 authorized annexation of the real estate; and Ordinance No. 1041-1978 rezoned a portion of the property to B—2 central business district and the remainder to F farming district to permit the construction and operation of the theater. Prior to the passage of these ordinances, the real estate was located in an unincorporated area of Cook County and was classified in the R—1 single-family residence district under the Cook County zoning ordinance.

The subject property is located at a substantial distance from the residentially developed area of Hoffman Estates but is in close proximity to residentially developed areas within the corporate limits of Barrington Hills and South Barrington. Pursuant to zoning ordinances, both plaintiffs had adopted comprehensive plans which would restrict the use of the land in the vicinity of the subject property to low-density single-family residences and to agricultural uses.

It was further alleged that the defendant's adoption of the zoning ordinances permitting the construction and operation of the theater denied plaintiffs due process under the Federal and State constitutions, constituted an invalid exercise of police power under the laws of this State, violated the zoning ordi-

nances of Hoffman Estates with respect to the B-2 central business district, and constituted a public nuisance against which temporary and injunctive relief was sought.

Plaintiffs further alleged that the annexation and zoning of the subject property for use and development of the contemplated project would occasion special injury and damage to them in their corporate capacities because of safety hazards on roads and highways within their corporate limits due to traffic congestion; the need to provide additional traffic police at an estimated annual cost to Barrington Hills of at least $42,000 and to South Barrington of not less than $24,000; the diversion of their existing police manpower from their ordinary duties to control theater crowds and to protect their residences from the disorderly activity that might result from persons attending the performances; the cost of purchasing additional squad cars for use only during the period when the proposed music theater would be in operation and of adding additional permanent police officers to their payroll; the expense of clearing from the roads and highways within their corporate limits the litter and debris which would result from crowds arriving or leaving the theater; the exhaust emissions from increased vehicular traffic which would degrade ambient air quality; the substantial increase in sound levels in the vicinity of the subject property resulting from music amplification and traffic; the adverse effects upon property values and hence tax revenues within the corporate limits of both villages; and the general impairment of the health, safety and welfare of residents of both municipalities.

The appellate court affirmance of the trial court's dismissal of plaintiffs' complaint was predicated upon its conclusion that plaintiffs had failed to demonstrate that they were aggrieved parties with standing to challenge Hoffman Estates' zoning of the subject property. Under its interpretation of this court's opinion in *City of Hickory Hills v. Bridgeview* (1977), 67 Ill. 2d 399, the appellate court specifically found that Barrington Hills and South Barrington had failed to demonstrate that they had a

real interest in the present controversy inasmuch as they could not allege that they had been or would be required to provide services directly to the subject property.

The opinion of the appellate court is predicated on an unduly narrow reading of *Hickory Hills.* Since the complaining municipality in that case was obliged under a previous court order to provide water and sewage services to the subject property, this court concluded that it was an aggrieved person with a real interest in the rezoning ordinances adopted by an adjoining municipality. One ordinance rezoned a portion of the area involved from a limited-industrial district to a single-family-residence district, and the other ordinance reclassified a portion of the subject property to a planned unit development. Our recognition of that municipality's standing to sue was based on its allegations demonstrating that it would be directly injured in its corporate capacity by the challenged ordinances. Nothing in *Hickory Hills,* however, indicates that the "real interest" conferring standing can arise only where the objecting municipality furnishes services directly to the subject property.

Under the rule set forth in *Hickory Hills,* the appellate court in *City of West Chicago v. County of Du Page* (1979), 67 Ill. App. 3d 924, 926, concluded that a municipality's objection to a county ordinance permitting the construction of township offices, a garage, and other facilities within 1½ miles of its single-family-residential district constituted a real interest sufficient to permit its intervention in an action challenging the ordinance. (See also *Forrestview Homeowners Association, Inc. v. County of Cook* (1974), 18 Ill. App. 3d 230). Decisions in other jurisdictions have similarly recognized that a municipality has standing to challenge the zoning ordinances of another municipality upon showing the existence of a real interest in the subject matter of the controversy. See *Borough of Cresskill v. Borough of Dumont* (1954), 15 N.J. 238, 245, 104 A. 2d 441, 444; *Borough of Allendale v. Township Committee of the Township of Mahwah* (1979), 169 N.J. Super. 34, —, 404 A. 2d 50, 51; see also *Ruegg v. Board of County Commissioners* (1978), 32 Or. App. 77, 79, 573 P.2d 740, 742; Annot. 49

A.L.R.3d 1126 *et seq.* (1973); 3 A. Rathkopf, Zoning and Planning ch. 36, sec. 1.2, at 34 (4th ed. 1979 Supp.); Comment, *Standing to Appeal Zoning Determination: the "Aggrieved Person" Requirement,* 64 Mich. L. Rev. 1070, 1082 (1966).

Defendants argue that according plaintiffs standing to sue will invite chaos in the relationships between municipalities and flood the courts with zoning litigation. Our holding, however, is not so broad, since it conditions a municipality's standing to challenge the zoning decisions of other governmental units upon a clear demonstration that it would be substantially directly and adversely affected in its corporate capacity.

Here, as set forth in greater detail earlier in this opinion, it is admitted for purposes of the motion to dismiss that the development of the proposed project under the challenged zoning ordinances will cause Barrington Hills and South Barrington to suffer special damages in their corporate capacities in the form of a loss of municipal revenues due to a diminution in property values, an increase in municipal expenditures for the hiring of additional police manpower and squad cars to monitor vehicular congestion, the additional expense of clearing litter and debris on their roads and highways that would result from theater crowds, the degradation of ambient air quality due to vehicular exhaust and the increase in sound levels resulting from the electronic amplification of music and traffic flows. While these effects of the rezoning may appear less severe than those in *Hickory Hills,* they nevertheless portend direct, substantial and adverse effects upon the plaintiff municipalities in the performance of their corporate obligations, thus giving them a real interest in the subject matter of the controversy. Their complaint was therefore improperly dismissed.

The judgment of the appellate court affirming the trial court's order dismissing the complaint of the plaintiffs is accordingly reversed, and the cause remanded for further proceedings consistent with this opinion.

Reversed and remanded.

EXHIBIT "D"

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

September 26, 1980

Mr. Richard Williams
Attorney at Law
1200 N. Gannon Dr.
Hoffman Estates, IL 60196

No. 52587—Village of Barrington Hills, a municipal corporation, et al., etc., appellants, vs. Village of Hoffman Estates, a municipal corporation, et al., etc., et al., appellees. Appeal, Appellate Court, First District.

The Supreme Court today denied the petition for rehearing in the above entitled cause.

Very truly yours,

Clell L. Woods

Clerk of the Supreme Court

EXHIBIT "E"

ARTICLE III

§ 2. Jurisdiction

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

. . .

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

EXHIBIT "F"

IN THE CIRCUIT COURT
of Cook County, Illinois

County Department, Chancery Division

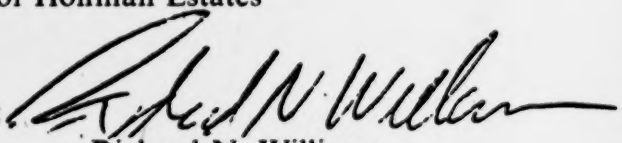
VILLAGE OF BARRINGTON HILLS, a municipal corporation, and VILLAGE OF SOUTH BARRINGTON, a municipal corporation. *Plaintiffs,* *v.* VILLAGE OF HOFFMAN ESTATES, a municipal corporation, NEDERLANDER REALTY COMPANY OF ILLINOIS, a corporation, PERFORMANCE PROPERTIES, INC., a Delaware corporation, NED-PROP, an Illinois Joint Venture, RKO GENERAL, INC., a New York corporation, PIONEER BANK AND TRUST CO., as Trustee under Trust No. 13552, dated April 24, 1962, FRED HANSEN and ETHEL HANSEN, *Defendants.*	No. 78 CH 5930

MOTION TO DISMISS COUNTS I, II, III, IV, V AND VI OF PLAINTIFF'S COMPLAINT

Defendant, Village of Hoffman Estates, a municipal corporation, by its attorney, Richard N. Williams, hereby moves this Honorable Court for an order dismissing Counts I, II, III, IV, V and VI of Plaintiff's complaint. As grounds, therefore, defendant Village of Hoffman Estates states the following.

The Village of Hoffman Estates joins in the motion filed by co-defendants, Nederlander Realty Company of Illinois, a corporation, Performance Properties, Inc., a Delaware corporation, Ned-Prop, an Illinois Joint Venture, RKO General, Inc., a New York corporation, Pioneer Bank and Trust Co., as Trustee under Trust No. 13552, dated April 24, 1962, Fred Hansen and Ethel Hansen.

Village of Hoffman Estates

By: 

Richard N. Williams
1200 N. Gannon,
Hoffman Estates, IL

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

VILLAGE OF BARRINGTON HILLS, a municipal corporation, and VILLAGE OF SOUTH BARRINGTON, a municipal corporation, *Plaintiffs,* *v.* VILLAGE OF HOFFMAN ESTATES, a municipal corporation, et al. *Defendants.*	NO. 78CH 5930

MOTION TO DISMISS

NOW COME the Defendants, NEDERLANDER REALTY COMPANY OF ILLINOIS, an Illinois corporation and PERFORMANCE PROPERTIES, INC., a Delaware corporation, doing business as NED-PROP, an Illinois Joint Venture, and PIONEER BANK AND TRUST CO., as Trustee under Trust No. 13552, by their attorneys, WEXLER AND SHAW, LTD., and KLAFTER, BURKE, KEANE AND NATHAN and move to dismiss the Complaint for Injunction and other relief of the VILLAGE OF BARRINGTON HILLS and the VILLAGE OF SOUTH BARRINGTON, and, in support of said Motion, state as follows:

1. That by the within action Plaintiffs contest the action of Defendant, VILLAGE OF HOFFMAN ESTATES, in annexing certain property which was located in an unincorporated area of Cook County and zoning and classifying said property in the B-2 Central Business District and the F-Farming District in accordance with the zoning ordinance of the VILLAGE OF HOFFMAN ESTATES. The actions of the VILLAGE OF HOFFMAN ESTATES in so zoning and annexing the subject property are presumptively valid under Illinois law.

2. That although the Plaintiffs' Complaint sets forth six causes of action, the real issue before this Court is the validity of the action of the VILLAGE OF HOFFMAN ESTATES in annexing and zoning the property in question for use as an auditorium center for the performing arts.

3. That Plaintiffs have failed to state a cause of action against these Defendants upon which relief can be granted. Under the facts present in this matter, the Plaintiffs are not capable of stating a cause of action upon which relief can be granted.

4. That Plaintiffs have alleged apparent causes of action in Counts I through VI respectively, sounding as follows:

A. Due process.

B. Arbitrary and capricious action of the Village.

C. Invalid exercise of police power of the Village.

D. Public nuisance.

E. Use of property not permitted by zoning ordinance.

F. Zoning is contrary to law.

5. That the Plaintiffs, neither of which are contiguous to or provide services to the property in question, lack authority to litigate the validity of the annexation and zoning of the property in question as they are not, jointly or severally, an "aggrieved party" under the laws of Illinois. *Village of Mt. Prospect* v. *County of Cook,* 113 Ill. App. 2d 336, 252 N. E. 2d 106; *Village of Arlington Hts.* v. *Cook County,* 133 Ill. App. 2d 673, 273 N. E. 2d 706; *Village of Arlington Hts.* v. *County of Cook,* 3 Ill. App. 3rd 213, 278 N. E. 2d 841; *Village of Bensenville* v. *DuPage County,* 30 Ill. App. 3d 324, 174 N. E. 2d 403.

6. That in addition to Plaintiffs' lack of standing, Plaintiffs cannot state a cause of action on constitutional grounds as it is obvious on the face of the Complaint that there has not been a confiscation of property belonging to the Plaintiffs. There has been no taking of Plaintiffs' property.

7. That in addition to Plaintiffs' lack of standing, Plaintiffs cannot state a cause of action on the ground that the VILLAGE OF HOFFMAN ESTATES acted arbitrarily and capriciously or invalidly exercised its police power since the Plaintiffs' only concern is the possibility of increased costs of public services. Said Plaintiffs have no concern for the advancement of the VILLAGE OF HOFFMAN ESTATES as a social, economic and political unit. The cultural and economic benefit to the VILLAGE OF HOFFMAN ESTATES, in particular, and the northwest suburban communities, in general, established by the record made before the VILLAGE OF HOFFMAN ESTATES, greatly exceeds the minor inconvenience alleged by Plaintiffs.

8. That in addition to Plaintiff's lack of standing, Plaintiffs cannot state a cause of action on the grounds of public nuisance since, as a matter of law, the proposed use cannot be classified as a public nuisance. (See *Bauman* v. *Piser Undertakers Co.*, 34 Ill. App. 2d 145, 180 N.E. 2d 705).

9. That Plaintiffs do not have standing to contest the use of the property by Defendants pursuant to Statute (Chap. 24, Sec. 11-13-15) since the only property of Plaintiffs within twelve hundred (1200) feet is allegedly a road which could not be considered to be substantially affected as required by the Statute. In addition, Defendants are constructing an auditorium, a use which is permitted under the zoning ordinance of the VILLAGE OF HOFFMAN ESTATES, and the VILLAGE OF HOFFMAN ESTATES has so declared the proposed structure to be an auditorium. See Affidavit of Richard Unwin, Director of Community Development, Village of Hoffman Estates, attached hereto, made a part hereof and marked Exhibit A.

10. That Plaintiffs do not have standing to contest the annexation of the subject property as their only remedy is a direct proceeding by *quo warranto.*

11. That the alleged injury to the Plaintiffs is the alleged increase in cost they may sustain in providing municipal services to their residents. The Plaintiffs may not defeat zoning

laws in order to avoid increased responsibilities and economic burdens which time and natural growth invariably bring. Neither Plaintiff is an "aggrieved" party with standing to contest the annexation and zoning of the property in question by the VILLAGE OF HOFFMAN ESTATES. It is obvious from the Complaint that the alleged injuries to the Plaintiffs are not special injuries, but rather those that would generally be sustained by the public as a whole and all municipalities in the general area. Therefore, Plaintiffs have failed to state a cause of action.

12. Further, Plaintiffs, and each of them, determined to file the instant litigation at closed meetings in violation of the public policy expressed in the laws of the State of Illinois—to wit, the "Illinois Open Meetings Act," Ill. Rev. Stat., ch. 102, Secs. 42 *et seq.* Thus, Plaintiffs attempt to litigate in equity in violation of the maxim that he who seeks equity must do so with clean hands. Plaintiffs cannot meet the burden of this maxim in light of their violation of the law.

13. Further, these Defendants have incurred expenses and/or obligations in excess of $4,150,000.00 as per the affidavit of Robert Nederlander, attached hereto, made a part hereof and marked Exhibit B. Said expenses and obligations were incurred in reliance upon the actions of the VILLAGE OF HOFFMAN ESTATES, and these Defendants have thereby acquired a vested property right which grants to them the right to complete the construction and use the property for the purposes originally authorized by the Defendant VILLAGE. The relief sought by the Plaintiffs cannot be granted by this Court as the vested property rights of these Defendants are superior to any rights of the Plaintiffs.

14. That the annexation and zoning of the property in question took place on August 22, 1978 and construction commenced on August 29, 1978. Plaintiffs chose not to file suit until 4:24 p.m. on September 12, 1978 and did not file their Petition for Preliminary Injunction until September 29, 1978.

In the interim these Defendants incurred expenses and/or obligations which were known to the Plaintiffs and Plaintiffs by their actions are estopped from now seeking equitable relief.

WHEREFORE, Defendants, NEDERLANDER REALTY COMPANY OF ILLINOIS and PERFORMANCE PROPERTIES, INC., doing business as NED-PROP and PIONEER BANK AND TRUST CO., as Trustee under Trust No. 13552, pray for the entry of judgment in their favor dismissing the Complaint for injunction and other relief and for their costs so wrongfully sustained herein.

NEDERLANDER REALTY COMPANY OF ILLINOIS and PERFORMANCE PROPERTIES, INC., d/b/a NED-PROP and PIONEER NATIONAL BANK AND TRUST CO., as Trustee under Trust No. 13552

By: _____
Wexler and Shaw, Ltd.

_____
Klafter, Burke, Keane and Nathan

Supreme Court, U.S.
FILED
JAN 5 1981
MICHAEL RODAK, JR., CLERK

No. 80-908

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES,
a Municipal Corporation,

Petitioner,

vs.

VILLAGE OF BARRINGTON HILLS, a Municipal Corporation, and VILLAGE OF SOUTH BARRINGTON, a Municipal Corporation,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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TABLE OF AUTHORITIES

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No. 80-908

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES,
a Municipal Corporation,

Petitioner,

vs.

VILLAGE OF BARRINGTON HILLS, a Municipal Corporation, and VILLAGE OF SOUTH BARRINGTON, a Municipal Corporation,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

In opposition to the petition of the Village of Hoffman Estates for a writ of certiorari, the respondents, the Villages of Barrington Hills and South Barrington, submit the following Additional Statement of the Case and Argument for consideration by the Court.

ADDITIONAL STATEMENT OF THE CASE

Only two of the six counts of the complaint involve due process claims. Count I is grounded on a claim that the rezoning in question deprives plaintiffs of due process of law

contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States and Section 2 of Article I of the Constitution of the State of Illinois. Count II rests on a claim that in rezoning the property in question the petitioner here, the Village of Hoffman Estates, has exceeded its statutory authority. Count III alleges that the rezoning is inconsistent with the express purpose and intent of the zoning ordinance of Hoffman Estates. Count IV claims that the presence of an open air music theater on the property would be a public nuisance. Count V rests on the claim that the music theater is not a lawful permitted use in the Hoffman Estates zoning district in which it is located. Count VI attacks the validity of the annexation agreement on procedural due process grounds for failure to make the annexation agreement available for public inspection sooner than three and one-half hours prior to the public hearing on the agreement, and also on the ground that the agreement contains provisions that are contrary to the statutory and decisional law of the State of Illinois.

In Illinois a home rule municipality, such as South Barrington, derives its authority and powers from the state constitution unless the legislature has limited those powers in the manner prescribed by the state constitution. Illinois Constitution, Article VII, §§ 6(a) through 6(m). Non-home rule municipalities, such as Barrington Hills, have only those powers granted by law and certain specifically defined constitutional powers. Illinois Constitution, Article VII, § 7.

SUMMARY OF ARGUMENT

The decision of the Illinois Supreme Court does not rest on any federal ground, and the petitioner has failed to carry the burden of demonstrating that the issues which it requests this Court to review were presented to the Supreme Court of Illinois.

The decision of the Supreme Court of Illinois rests entirely upon an independent and adequate state ground.

A determination by the highest court of a state that political subdivisions of the state have due process rights which they may assert in litigation does not raise a federal question in the context of this case because the existence of a right to due process depends upon the existence of a protected interest in liberty or property. The question of what constitutes a "property interest" is a matter of state law. Even if the Illinois Supreme Court had rested its ruling on a due process ground, it would have amounted to no more than a determination that as a matter of state law the corporate interests of municipalities are tantamount to "property interests" that are entitled to due process protection. Moreover, the states are free to give a more expansive meaning to the due process clause of the state constitution than is required as a matter of federal constitutional doctrine.

ARGUMENT

I.

THE PETITIONER HAS FAILED TO CARRY ITS BURDEN OF SHOWING THAT A FEDERAL QUESTION WAS DECIDED BY OR PRESENTED TO THE ILLINOIS SUPREME COURT

The decision of the Illinois Supreme Court in this case does not rest on the determination of any federal question. The ruling dealt only with the showing a litigant must make as a matter of state law to qualify as an aggrieved person having a real interest in the controversy with standing to litigate the issues presented by the pleadings. This Court has held that it does not have jurisdiction to review the determination of a federal question unless it was presented to and relied upon by the court below. *Crowell* v. *Randell,* 35 U.S. (10 Pet.) 368, 392 (1836). This Court has "consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale* v. *Louisiana,* 394 U.S. 437, 438 (1969), and cases cited therein at page 438.

The party seeking review by this Court has the burden of proving that the federal questions were presented to the state courts. Where, as in this case, the highest state court has failed to pass upon the federal question and gives no indication that it was ever asked to consider any federal question, it will be assumed that the omission results from a failure to present the question properly in the state court, unless the petitioner affirmatively shows that the question was presented. *Street* v. *State of New York,* 394 U.S. 576, 582 (1969); and, *Fuller* v. *State of Oregon,* 417 U.S. 40, 50 n. 11 (1974).

In its petition for certiorari, the petitioner points out that a federal question was raised by Point 6 of the Motion to Dismiss. (See, App. 24a) However, the petition contains no showing, or even a claim, that the questions it is asking this Court to review

were ever presented to the Illinois Supreme Court. Even if a question sought to be reviewed was presented to a lower state court, but was not properly preserved on appeal to higher state courts, the requirement that a federal question must have been presented to the highest state court has not been satisfied. *Connecticut Mutual Life Ins. Co.* v. *Moore,* 333 U.S. 541, 544 (1948). In this case not even the decision of the Illinois Appellate Court, in which petitioner prevailed, rested upon or made any mention of the federal questions which the petitioner seeks to have reviewed by this Court. See, *Village of Barrington Hills* v. *Village of Hoffman Estates,* 75 Ill.App.3d 461, 394 N.E.2d 599 (1979), rev'd., 81 Ill.2d 392, 410 N.E.2d 37 (1980)

The petition for certiorari filed by the Village of Hoffman Estates is insufficient because it contains no showing whatsoever that the questions which it seeks to have reviewed were in fact presented to the Illinois Supreme Court. The petitioner has simply failed to carry the burden imposed upon it by the decisions of this Court to show that it has raised the federal questions in the proceedings before the highest state court that considered the case.

II.

THE DECISION OF THE ILLINOIS SUPREME COURT RESTS ON AN INDEPENDENT AND ADEQUATE STATE GROUND

Even when a petitioner has presented a federal question which has been passed upon by the highest court of a state, this Court will still decline to review the state court decision on a petition for a writ of certiorari if an independent and adequate state ground exists for that decision. *Zacchini* v. *Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 566 (1977); and, *Wilson* v. *Loew's Inc.,* 355 U.S. 597, 598 (1958). In this case the only basis for the decision of the Illinois Supreme Court was

a state ground. Specifically the Illinois Supreme Court held that as a matter of Illinois law the respondents had met the tests previously set down in *Village of Hickory Hills* v. *Village of Bridgeview,* 67 Ill.2d 399, 367 N.E.2d 1305 (1977), for determining when municipalities are sufficiently aggrieved by the zoning regulations of their neighbors to have standing to question the validity of those regulations.

The petitioner's reliance upon *Warth* v. *Seldin,* 422 U.S. 490 (1975), is mistaken. *Warth* affirmed a holding that the plaintiffs did not have standing to invoke the aid of the federal courts. So the rule which this Court announced in *Warth* has no application because the rule with respect to standing adopted by the Illinois Supreme Court in this case dealt with the state law requirements for access to the state courts. It would be novel doctrine if providing access to the state judicial system were to be held to be a denial of due process.

The state courts are not constrained by the relatively narrow rule announced in *Warth.* They are at liberty to apply more liberal rules with respect to standing, a point which the Ninth Circuit recognized in *United States* v. *Cella,* 568 F.2d 1266, 1279 n. 9 (9th Cir. 1978). For example, in *Suffolk Housing Services* v. *Town of Brookhaven,* 91 Misc.2d 80, 397 N.Y.S.2d 302, 308-309 (1977), mod. and aff'd., 63 App. Div.2d 731, 405 N.Y.S.2d 302 (1978), a New York court refused to accept the argument that *Warth* was a binding limitation on standing for the state courts and permitted plaintiffs to proceed with a state court suit that almost certainly would have been dismissed for want of standing under *Warth* had it been brought in a federal court.

Nor does *Orr* v. *Orr,* 440 U.S. 268 (1979), help the petitioner because in that case the Louisiana court had decided the case on a federal ground and this Court held that the plaintiff did have standing to maintain the action.

In this case petitioner seems to claim that the Illinois rule with respect to the standing of municipalities is constitutionally impermissible because it transgresses the federal "prudential

limitation" on standing articulated by *Warth.* But *Warth* makes it clear that its standards are for the federal courts not the state courts. The state courts are free to fashion their own rules for their own courts with respect to standing even though in some instances the state rule may be more restrictive. See, *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 262 n. 8 (1977). The question of standing in the state courts being one of state law, there was in this case an adequate and independent state ground for the decision irrespective of the constitutional issue that this Court is now urged to review. When a state decision rests on an adequate foundation of state substantive law it is immune from review in the federal courts. *Wainwright* v. *Sykes,* 433 U.S. 72, 81 (1977); *Herb* v. *Pitcairn,* 324 U.S. 117, 125 (1945); and, *Murdock* v. *City of Memphis,* 87 U.S. (20 Wall.) 590, 626 (1874).

III.

THE DECISION OF THE ILLINOIS SUPREME COURT DOES NOT INVADE ANY PROTECTED DUE PROCESS RIGHT OF THE PETITIONER

The petitioner asks that this Court grant certiorari to consider whether one municipality may assert a federal due process claim against another municipality. The thrust of the petitioner's argument suggests that if its petition is granted, Hoffman Estates will argue that the protection of federal due process does not extend to municipalities. There is a grave difficulty with petitioner's position. If petitioner's substantive argument is sound, then its petition should not be granted because the question it has presented for review is whether, as a municipality, its federal due process rights have been invaded by the decision of the Illinois Supreme Court.

The petition for certiorari is least clear on the question of just what due process right of the petitioner has been invaded by the decision of the Illinois Supreme Court. The petitioner appears to suggest that the decision of the state court was

erroneous. However, it was settled many years ago by this Court that federal due process does not insulate litigants from erroneous or even inept decisions or afford an occasion for review of such decisions on due process grounds by this Court. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673, 680 (1930); and, *American Railway Express Company* v. *Kentucky,* 273 U.S. 269, 272-74 (1927).

Williams v. *Mayor and City Council of Baltimore,* 289 U.S. 36 (1933), does not provide a basis for the petition either, because this is not a suit by units of local government against the governmental body that created them. Indeed, South Barrington and Hoffman Estates derive their power as home rule units from the state constitution. Illinois Constitution, Article VII, §§ 6(a) through 6(m).

Moreover, the question of whether a municipality may assert a federal due process claim turns on the question of whether there has been an invasion of a protected interest in liberty or property and, unless the interest asserted is guaranteed by the Bill of Rights, such interest attains its constitutional status by virtue of the fact that it has been recognized and protected by state law. *Paul* v. *Davis,* 424 U.S. 693, 710 (1976). Thus even had the Supreme Court of Illinois grounded its decision upon the federal due process questions raised by petitioner in this Court, the opinion would have been no more than a holding that as a matter of Illinois state law the corporate interests of a municipality are tantamount to protected property interests. Such a conception of a protected property interest, even had it been explicit in the opinion of the Illinois Supreme Court, would not have raised a federal constitutional question that would be subject to review in this Court.

Were the Village of Hoffman Estates claiming that it was denied access to the state court system, then a federal due process claim might reasonably have been made. But the

petitioner appears to be arguing that the requirements of federal due process should have barred the respondents from access to the state courts. That position is not even marginally plausible because the Illinois courts are free to adopt, as a matter of state constitutional law, a more expansive view of the meaning of procedural due process than is mandated as a matter of federal constitutional law. See, for example, *Pruneyard Shopping Center* v. *Robins,* ____ U.S. ____, 100 S.Ct. 2035, 2042-43 and n. 8 (1980); *State* v. *Johnson,* 68 N.J. 349, 346 A.2d 66, 67 (1975); *People* v. *Disbrow,* 16 Cal.3d 101, 545 P.2d 272, 280-81 (1976); and, *Southern Burlington NAACP* v. *Township of Mount Laurel,* 67 N.J. 151, 336 A.2d 713, 725, app. dismissed and cert. denied, 423 U.S. 808 (1975). See also, Brennan, William J., Jr., *Developments in Constitutional Law,* 99 N.J.L.J. 473, at 483 (June 3, 1976). So even if the present petition were not otherwise insufficient, there would not be any authentic Federal constitutional question for this Court to consider.

CONCLUSION

Petitioner has failed to carry its burden of showing that it has properly reserved for review the constitutional questions it presents and the decision that it asks this Court to review is purely a ruling on the state law of standing that rests entirely on state grounds. Moreover, the federal due process questions raised by petitioner are actually illusory. Accordingly, respondents respectfully pray that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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